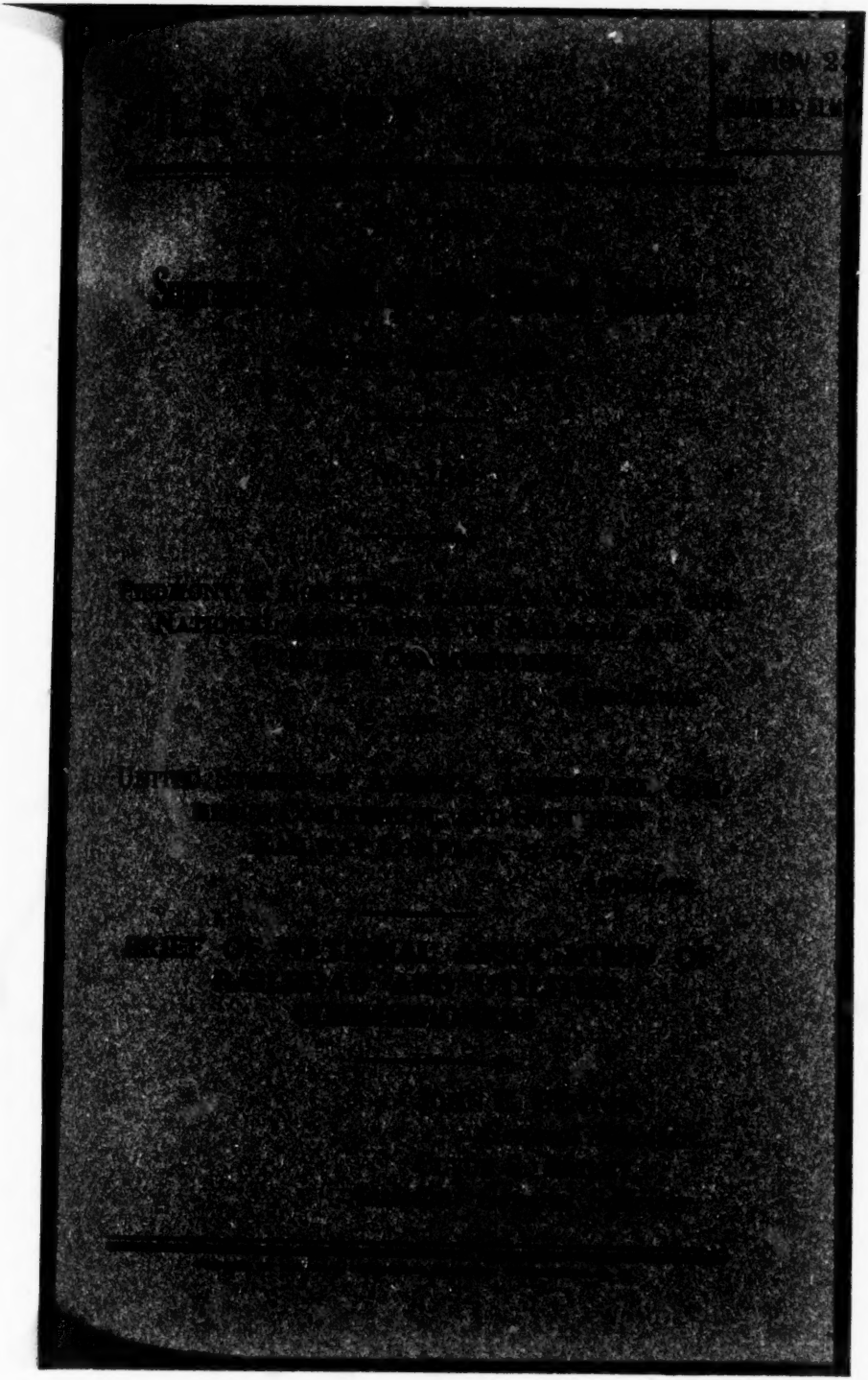

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IN THE

Supreme Court of the United States

October Term, 1929

No. 164

PIEDMONT & NORTHERN RAILWAY COMPANY and NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS,

Appellants.

VS.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY, *et al*,

Appellees.

BRIEF OF NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

REFERENCE TO OPINION BELOW

The appellants seek to set aside a judgment entered in the United States District Court for the

Western District of South Carolina, affirming an order of the Interstate Commerce Commission. The decision of the Interstate Commerce Commission was reported 138 I. C. C. 363. The opinion of the Court was reported 30 F. (2d) 421.

STATEMENT OF GROUND OF JURISDICTION INVOKED

It is claimed that jurisdiction to review the order involved exists under 38 Stat. L. 219 and 36 Stat. L. 539.

STATEMENT OF THE CASE

A statement of the case can be largely taken from the opinion of the court below. The quoted matter under this caption is taken from that opinion unless otherwise indicated. The italics are ours.

The Piedmont and Northern Railway Company "owns and operates a line of electric railway in South Carolina, extending from Greenwood to Spartanburg, a distance of 89.9 miles, with a branch from Belton to Anderson of 11.3 miles; and also a line of electric railway in North Carolina extending from Gastonia to Charlotte, a distance of 23.5 miles, with a branch to Belmont of 3.2 miles; and uses these lines, 127.9 miles in all, in the transportation of persons and property, as a common carrier, in interstate commerce. In the latter part of 1926, the corporation determined to build extensions of its road, 128 miles in length,

consisting of a line of about 53 miles in length, running from Spartanburg, South Carolina, to Gastonia, North Carolina, and also a line 75 miles in length from Charlotte to Winston-Salem in the latter State. This project came to the attention of the Commission and it notified the Railway Company by letter of March 8, 1927, that it would be expected to file an application for authority to do the work under Paragraphs 18 to 21 of Section 1 of the Interstate Commerce Act as amended by Transportation Act, 1920, 41 Stat. 456, 474, 477-8. The Commission said that in its opinion the railroad was not an interurban electric railway excepted from its jurisdiction by Paragraph 22 of Section 1 of the act, 41 Stat. 478. Accordingly on March 26, 1927, the Railway Company filed an application for a certificate of public convenience and necessity, without prejudice, however, to its right to assert that in this respect it is not subject to the authority of the Commission." (R. 222.)

"The existing lines of the Piedmont and Northern have connections with the street railway systems of the cities which it serves, acquired either by direct ownership or by contracts for trackage rights. Thereby *its passenger cars within the cities en route become street railway facilities.*" (R. 233.)

The Commission found that the road "performs an ordinary interurban passenger service." (R. 37.)

"*Between the cities* there are frequent stops for passengers *at an average distance of 1.2 miles*

apart—that is to say, 106 stops in 128 miles of road. 49 passenger trains daily traverse various parts of the line. There are *more daily trains and more frequent stops* than on the corresponding mileage of the Southern Railway, *a parallel steam railroad admittedly of the first class.* Furthermore, the spacing between the trains is more uniform. *The passenger cars are motivated by self-contained motor units, and are lighted from a trolley. By reason of their equipment, they are not acceptable upon steam lines.*

"*The use of city streets for the collection and delivery of freight is a peculiar characteristic of the Piedmont and Northern and other interurban roads.* Its electric locomotives and cars are constructed to take the sharp curves and steep grades peculiar to the city streets. *It is even possible for electric locomotives to go inside a building where a steam locomotive cannot go.* The switching service thus made available in the cities is *extremely convenient for industries of all sorts, including factories, wholesale houses and even retail houses. The street railway lines are used largely for delivery and pick up service;* but the bulk of the through traffic does not move over the city streets.

"*Local freight service between cities* on the petitioner's lines is also *more flexible and convenient than that rendered by the steam railways.* There are *more daily freight trains* in small units. 18 trains which average 14 loaded and 6 empty cars, are operated daily. There are *more frequent stops on the Piedmont & Northern than on the Southern*

in local station to station movement of freight. In addition, there are local switches for industrial plants, so that *freight is delivered and picked up all over the line. In the delivery of less than car load freight in short distances up to sixty miles, there is more expedition and greater dispatch than in the handling of similar business on the Southern.* The electric locomotives for the movement of freight are of somewhat lighter character than those employed on the steam roads and are unfit for long haul heavy load traffic such as that hauled by the electric locomotives on the Virginian Railway. The cars and locomotives are so equipped that they can be used either upon a voltage of 1500 d. c. between the cities or 600 d. c. inside the cities." (R. 233.)

"The roadbed, rolling stock and equipment are of such a character that it is well suited to cooperate with steam railroads in the transmission of freight to distant points. Freight trains of 45 cars, using 2 locomotives, are not unusual; the average train is 20 cars. Most of the freight traffic is handled in cars owned by steam railroads but the petitioner owns 165 automobile cars and 99 other box cars, all of which are of ordinary steam railway type and move freely on foreign roads. Altogether, there are 337 cars. The construction is that of a standard steam railway." (R. 235.)

"Traffic agreements have been made with the Seaboard Air Line, the Southern Railway and other roads with reference to rates and the division of revenue received in the interchange of traffic.

While street railways have been used for local deliveries, the through freight does not pass through the cities, but is carried over additional lines which run around the cities and avoid the city streets.

"The business methods of the road are similar in many respects to those of steam railroads. It is a party to the tariffs of the steam roads and to the uniform express contract of the American Railway Express Company. It is a member of the American Railway Association, the Southern Freight Association and other traffic organizations of the steam roads. It is represented by powers of attorney in nearly every tariff bureau of the United States and has 502 published tariffs. It follows the methods of steam roads in matters of rate divisions, interline billing, claim settlements and in all of its relations with shippers and consignees. It publishes a tariff directory which is on file with the Interstate Commerce Commission. It has a general agent in New York, a commercial agent at Atlanta and at all of its connecting points." (R. 236.)

"Petitioner's witnesses, speaking in round figures, state that 92 per cent of the revenue is derived from freight and only 8 per cent from passenger traffic. * * * While 97.63 per cent of the passenger revenue was derived from local traffic, and only 2.37 per cent from interchange, the reverse is true with revenues from freight of which only 4.75 per cent came from local station-to-station movement and 95.25 per cent from traffic handled jointly with steam roads. Of 72,886

loaded cars handled, 68,370 were interchanged, most of them in interstate movement, reaching all parts of the United States." (R. 237.)

It is its general freight business, made possible by the interchange relations with steam lines so described, upon which "the Commission, in its opinion, and the opponents of the petitioner in this case depend to show that the road is not merely an interurban electric railway, but something far more important in the business of transportation" (R. 235), and hence not within the exception created by paragraph (22) of Section 1 of the Interstate Commerce Act.

The Piedmont and Northern has not been classified with steam roads for valuation purposes by the Interstate Commerce Commission. It is subject to the same accounting rules as other electric lines. The Commission, on October 12, 1920, ruled that it was an interurban electric railway not subject to Section 20a of the Interstate Commerce Act, relating to the issuance of securities. (R. 143, 249.) *The Railroad Labor Board, construing an exception for interurbans the same in terms as the exception contained in paragraph (22), held that the Piedmont and Northern was an interurban electric.* (R. 248.)

Having filed its application for a certificate, in accordance with the procedure outlined by the Commission in its notice, and outlined also in the opinion of this Court in *Texas & Pacific Railway v. Gulf, Colorado & Santa Fe*, 270 U. S. 266, the Piedmont & Northern moved to dismiss the same

for lack of jurisdiction, upon the ground that as to new construction it was exempt from the Commission's jurisdiction under the provisions of paragraph (22) of Section 1 of the Interstate Commerce Act. (R. 28.)

The Interstate Commerce Commission did not grant the motion to dismiss, but, after a hearing, ruled that the Piedmont & Northern was not an interurban electric railway within the meaning of said paragraph (22), and that the Commission had jurisdiction upon the application. (R. 40.) Exercising the jurisdiction thus asserted, it denied the application for a certificate. (R. 77.) The ruling was made a part of the order of denial by reference. (R. 79.)

The Piedmont & Northern then applied to the United States District Court for the Western District of South Carolina to set aside the order. The case was submitted upon the evidence taken before the Commission to a statutory court. That court handed down an opinion sustaining the Commission's order (R. 222), and a decree was entered denying the relief prayed for, and dismissing the petition. (R. 252.) This appeal was prosecuted from that decree. (R. 262.)

A preliminary question of jurisdiction is involved. In the court below the Government moved to dismiss the bill upon the ground that the court is without jurisdiction to review the order of the Commission complained of in the bill, for the reason, as it was alleged, that the order is a negative order within the meaning of the decision of this

Court in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282 (R. 97). The case, however, was disposed of upon other grounds, as above stated.

THE INTEREST OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

The National Association of Railroad and Utilities Commissioners is a party to the proceedings, having intervened therein before the Interstate Commerce Commission, and also having intervened in the court below as a party plaintiff seeking to have the order declared void. The National Association of Railroad and Utilities Commissioners is a voluntary association which includes in its membership the members of the Corporation Commissions, Railroad Commissions, Public Service Commissions, and other regulatory commissions and boards of all of the several states of the United States, except Delaware, which has no commission. Practically all of said commissions and boards, under the laws of their respective states, exercise jurisdiction over common carriers, including interurban electric railways, and many of them exercise jurisdiction over such railways with respect to construction of new lines and extensions of existing lines (R. 110).

The interest of the Association in this case arises from the fact that it involves the construction of paragraph (22) of Section 1 of the Interstate Commerce Act, and the determination of the extent to which the jurisdiction of the several states, and of their duly authorized regulatory

commissions and boards, was preserved over electric railroads such as the Piedmont and Northern by said paragraph (22). The Commissions of North and South Carolina both favor the proposed construction (R. 40). In the interest of those states, the Association would protest a construction which would deprive them of jurisdiction which Congress has chosen to leave undisturbed. The Association's greatest interest, however, is in the precedent which the Court's decision in this case will make. The question involved is one which affects in a very vital way the ability of state regulatory commissions to perform the duties laid upon them by state law. If the order of the Interstate Commerce Commission here involved shall be sustained, the status of every important electric railroad engaged in interstate commerce will become at once uncertain. Neither the roads themselves nor the state regulatory commissions can know when they are subject to state jurisdiction as to construction and abandonment and as to securities issues. And there will be no way in which the uncertainty can be resolved except by litigation before the Interstate Commerce Commission or in the courts, and then such litigation will solve the uncertainty for the purpose of the case litigated only. Without such litigation the state commissions can not know when it is their duty to demand from electric railroads obedience to state laws, and, on the other hand, the electric carriers can not know when they may safely consider themselves interurbans, and yield obedience to state laws.

Since Transportation Act, 1920, was passed, and prior to the Commission's decision in this case, hundreds of millions of dollars of securities were issued by electric railroads under the authority of state regulatory officials, in the belief that the issuing carriers were exempt from the provisions of the federal law, as interurban electrics. If the Commission's construction of the statute is valid these securities, under the provisions of Section 20a, are in large part void, and the officers, attorneys, and agents of the carriers issuing the same are liable therefor, in civil actions, and are liable also to criminal prosecution, under paragraph (11) of Section 20a of the Interstate Commerce Act. The validity of important issues of securities (*Applications of Chicago, North Shore & Milwaukee Railroad*, cited page 41 this brief) already appear to be in controversy. See *Hild et al.* v. *Chicago, North Shore & Milwaukee Railroad*, 150 I. C. C. 367.

The interest of the state commissioners, therefore, runs to the protection of the jurisdiction of state regulatory officials for the future, and to the protection also of the validity and effectiveness of orders heretofore made by them in the exercise of such jurisdiction.

SPECIFICATION OF ERROR

The assignment of errors sets forth the following:

> "The District Court erred. * * *
> "(3) In holding that the railway of peti-

tioner is not an interurban electric railway, which is not operated as a part of a general steam railroad system of transportation." (R. 264.)

This is the only error which will be discussed in this brief, or upon oral argument, on behalf of the National Association of Railroad and Utilities Commissioners.

ARGUMENT

SUMMARY OF POINTS

The Court Has Jurisdiction to Review the Order Sought to be Set Aside.

Paragraph (22) of Section 1 Excludes the Piedmont and Northern from the Jurisdiction of the Interstate Commerce Commssion Over New Construction.

The Term "Interurban Electric Railway" Had a Well Understood and Definite Meaning at the Time the Transportation Act, 1920, Was Enacted, Which Embraced the Piedmont and Northern.

Paragraph (22) Was Inserted by Congress in Response to Requests for the Exclusion of All Electrics.

Congress Used the Term "Interurban Electric" with Obvious Intent That It Should Include Roads of the Type of the Piedmont and Northern.

The Commission and the Court Below Have Erroneously Disregarded the Obvious Intent of Congress.

The Commission's Construction of the Term "Interurban" in This Case Is Inconsistent with Its Construction of the Same Term in Other Cases.

The Opinions of This Court Have Been Misapplied Below.

There Is No Evidence to Sustain the Commission's Finding That the Piedmont and Northern Is Not an Interurban.

The Commission and the Court Below Called the Piedmont and Northern an Interurban, but Refused It the Benefit of That Classification.

THE COURT HAS JURISDICTION TO REVIEW THE ORDER SOUGHT TO BE SET ASIDE

The Piedmont and Northern has in this case followed the exact procedure outlined by this Court in *Texas & Pacific* v. *Gulf, Colorado & Santa Fe*, 270 U. S. 266.

In that case, which involved the construction of a track claimed by the carrier to be within the exception of paragraph (22) of Section 1 as an industrial track, the Court said:

> "A carrier desiring to construct new tracks does not, by making application to the Commission, necessarily admit that they constitute an extension. It may secure a determination of the question, without waiving any right, by asserting in the application that in its opinion a certificate is not required because the construction involves only an industrial track."

The motion to dismiss, made below, upon the ground that the order of the Commission herein sought to be set aside is a negative order, within the rule laid down in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, disregards this approval of this Court of the procedure which has been followed, and overlooks the true ground of the decision in the *Procter & Gamble* case.

When this Court in *Texas & Pacific Railway* v. *Gulf, Colorado & Santa Fe,* said that a carrier desiring to make construction could, by making application for a certificate, "secure a determination of the question" of its right to construct without a certificate, it, of course, meant a determination according to law, and subject to judicial review for the correction of errors made by the Commission in its action upon such application.

If the Commission, upon the petition of the Piedmont and Northern, had asserted jurisdiction, and had issued the certificate asked for therein, there can be no question that any opposing carrier, a party to the case, could have maintained an action to review the order. In such case the application would have produced a "determination" of the question presented.

On the other hand, if the Commission, in the decision which it has made adverse to the Piedmont and Northern, has committed an error of law, it will not be contended that the carrier is without remedy. If this suit to correct the error can not be maintained, then the carrier may proceed with the proposed construction, and defend in any proceeding brought to compel obedience to the order by showing that it is in fact an interurban electric railway. If that course must be pursued, the application has not resulted in a "determination" of the question designed to be presented to the Commission by the application: and it would appear that the procedure before the Commission outlined by this Court in the *Texas & Pacific* case, will result

in a "determination" only when the Commission asserts jurisdiction and grants the certificate sought for. In all other cases the question will remain undetermined. The Court can not have intended to suggest any such one-sided procedure.

The argument, moreover, that there can be no review of this order in this case because it is a negative order, disregards the true character of the order. The Commission's report is a part of the order. That report contains the affirmative ruling that the Piedmont and Northern is a railroad of such character as to be subject to the Commission's jurisdiction as respects proposed new construction. That is a ruling which was necessary to a disposition of the application before the Commission. By it the rights of the applicant carrier were adversely affected. If it was erroneous as a matter of law, the carrier is entitled to be relieved by a judicial review sought in the manner provided by statute. The District Court Jurisdiction Act (38 Stat. L. 219) transferred to the District Court the pre-existing jurisdiction of the Commerce Court, which extended to

> "cases brought to enjoin, set aside, annul or suspend in whole or in part *any* order of the Interstate Commerce Commission." (36 Stat. L. 539.)

On the face of the statute the jurisdiction granted would appear to extend to all orders, but the Court has held that it does not extend to orders

which merely refuse an exercise of the Commission's legislative power. Notwithstanding such an order may be based upon an erroneous conception of the law, the setting of it aside would afford no relief to a complaining party unless the Court should also go forward and exercise the legislative power which the Commission has refused to exercise, and the exercise of such power is beyond the jurisdiction of the courts.

The setting aside of the Commission's order in *Procter & Gamble Co. v. United States*, would not have vindicated any right of the complaining company. Vindication of that right, if any right existed, required an exercise of the Commission's legislative power; and since that power could not be exercised by the Court, it was held that a proper interpretation of the statute providing for judicial review did not vest the Court with jurisdiction to determine questions of law involved in a proceeding where nothing the Court could do would vindicate the legal right of any party.

The same situation existed in *Lehigh Valley Railway* v. *United States*, 243 U. S. 413, cited and relied upon by the Commission in the court below. There the Lehigh Valley Railroad had sought to be relieved from the effect of a federal statute by an order of the Interstate Commerce Commission. The Panama Canal Act of 1910 authorized the Commission to extend the time during which a rail carrier might continue to control a water carrier operating through the Panama Canal, provided the Commission should find that the exten-

sion granted would not exclude or reduce competition between such rail line and such water carrier.

Upon the application of the Lehigh Valley Railroad for an extension, the Commission found that such rail carrier did or might compete with the water carrier involved, and refused to grant the extension. It was this order which the Lehigh Valley sought to set aside. The Court held that the order was "negative in substance as well as in form." In other words, the Court held that the appellant had no right which could be vindicated by setting the order aside. By the statute, if it competed with the boat line, it was forbidden to continue its ownership after the date specified by the statute. From this requirement of the statute it could not be relieved except by an administrative finding made by the Commission, and by an order of the Commission based upon such finding. A setting aside of the order could not therefore change the status of the carrier. It would remain inhibited by the statute from holding beyond the date fixed by the statute. This situation could be changed only by a finding of the Commission and an order of the Commission. This was clearly pointed out by the Court in its opinion, as follows:

> "The risk to which the railroad was left subject did not come from the order but from the above-mentioned section of the Panama Canal Act."

The situation in this case is diametrically opposite. The Piedmont & Northern, as an interurban electric railway, was not subject to the jurisdiction of the Interstate Commerce Commission as to its proposed new construction. It had the right to build without procuring any certificate from the Commission. The question as to its interurban character having arisen, however, it was in effect directed by the Interstate Commerce Commission to follow the procedure which had been outlined by this Court in *Texas & Pacific Railway* v. *Gulf, Colorado & Santa Fe*, so that a record might be made upon which the question of jurisdiction might be determined in an orderly manner. It made such application, following strictly the procedure outlined by this Court.

Upon the application so presented to the Commission the question of the character of the applicant, and whether excluded from the Commission's jurisdiction by paragraph (22) of Section 1, arose as preliminary questions necessarily to be determined for the proper disposition of the case, and hence within the Commission's jurisdiction to determine. The Commission's decision, therefore, when made, became necessarily binding upon the parties unless set aside as erroneous in law in a proper proceeding brought to review such decision.

The Commission determined and ruled that the Piedmont and Northern was not an interurban, and was subject to the Commission's jurisdiction as to the proposed construction. That decision fixed the status of the Piedmont and Northern for

the purposes of the matters involved in the proceeding before the Commission, unless the order shall be held erroneous and set aside. If it shall be set aside, as not sustained by the evidence before the Commission, the status of the Piedmont and Northern as an interurban electric railway, not subject to the Commission's jurisdiction as to construction, will be re-established, and its right will be vindicated. It will have procured "determination" of its questioned right by following the course which this Court indicated as proper in *Texas & Pacific Railway* v. *Gulf, Colorado & Santa Fe*, heretofore cited.

PARAGRAPH (22) OF SECTION 1 EXCLUDES THE PIEDMONT AND NORTHERN FROM THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION OVER NEW CONSTRUCTION

Paragraphs (18) to (21) of Section 1 of the Interstate Commerce Act confer jurisdiction upon the Interstate Commerce Commission over the construction of new lines and over extensions of lines and over the abandonment of existing lines and parts of lines. Paragraph (22), however, provides as follows:

> "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street,

> suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

This paragraph excludes the Piedmont and Northern from the Commission's jurisdiction over construction. The remainder of this brief will be directed to the support of this proposition.

THE TERM "INTERURBAN ELECTRIC RAILWAY" AS USED IN SAID PARAGRAPH (22) WAS CONSTRUED BY THE COMMISSION AND BY THE COURT BELOW AS NOT INCLUDING THE PIEDMONT AND NORTHERN

The Commission and the statutory court have both construed "interurban electric railway" as not including the Piedmont and Northern. Neither the Commission nor the Court, however, makes any attempt to define the term "interurban electric railway." The Commission says:

> "It appears clearly that the applicant's railroad, as proposed to be extended, would be a commercial railroad operated by electricity and not an electric interurban line within the meaning of paragraph (22) of section 1. We are of opinion that we have jurisdiction of the application."

The Court below said:

> "It is true that an interurban carrier may

be entitled to that descriptive name although it participates in general freight traffic; but it does not follow that every electric carrier, so engaged, is an interurban railroad. Freight traffic may be limited in extent and within the scope of a carrier devoted primarily to local business, and at the same time, be general in its nature. The carrier may transport the kinds of property usually carried by steam roads in addition to the carriage of baggage, mail and express, and yet be so restricted in its operations that it may not be properly classified with general steam carriers whose operations cover a wide field. See the discussion in Lackawanna & Wyoming Valley Ry., 105 I. C. C. 178. * * *

"It is obviously difficult to form an exact definition of the term under discussion and to say when the general freight business of an electric railway has become so great that it has crossed the line betwen an interurban railroad, engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute. But there is no difficulty in the case at bar in determining that the Piedmont and Northern has ceased to be primarily an interurban railroad. If any line of demarcation is to be drawn there can be no doubt that a railroad, 92 per cent of whose traffic comes from the general transportation of freight, and 95

> per cent of whose freight traffic is interchanged with carriers connecting it with all parts of the United States, is to be placed in the same category as a general steam railroad."

It will thus be seen that the classification of the Piedmont and Northern was made to depend not upon whether it fell within the class of roads commonly called "interurban electric railways," but upon the extent of its freight business as compared with other business, and upon the proportion of that business interchanged with steam lines.

These were criteria not prescribed by Congress for the application of which there was no warrant.

THE TERM "INTERURBAN ELECTRIC RAILWAY" HAD A WELL UNDERSTOOD AND DEFINITE MEANING AT THE TIME THE TRANSPORTATION ACT, 1920, WAS ENACTED, WHICH EMBRACED THE PIEDMONT AND NORTHERN

It is an elementary rule that the purpose of the construction of any language in any statute or document is the discovery of the intent of the person or persons who used the language, and that the first resort in every case is to the words used and to their ordinary significance.

> "If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of

> the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it." (*Lake County* v. *Rollins*, 130 U. S. 662.)

For more than a decade before the Transportation Act, 1920, was enacted, the term "interurban" had been commonly used to describe a road of the class to which the Piedmont and Northern belongs. This Court, other departments of the federal government, the Interstate Commerce Commission itself and its principal bureaus and the Congress have used the term in that sense, and it was commonly so used by the public generally.

If this be true, it must be assumed that Congress used the words in that commonly accepted sense, and the intent of the statute may not be varied by resort to construction, under which construction less than the entire class of interurban electrics are granted the benefit of the exception made in said paragraph (22).

THE SUPREME COURT SO USED THE TERM

In *Omaha & Council Bluffs Street Railway Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, the Court was dealing with an electric railway running between Omaha, Nebraska, and Council Bluffs, Iowa. The Interstate Commerce Commission had asserted jurisdiction over the fares of that road, and it was contesting the validity of the Commission's order upon the ground

that it was not a "railroad" within the meaning of that term as used in the Act to Regulate Commerce. The Court sustained the contention.

In considering one of the contentions made by the Commission, the Court said:

> "But it is said that since 1887, when the act was passed, *a new type of interurban railroad has been developed which, with electricity as a motive power, uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight, express and the mail for long distances at high speed.* We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight." (Italics ours.)

Heretofore this Court has used the term "interurban electric railway" as embracing electric railways generally, other than street and suburban railways. Later herein is cited *Spokane & Inland Empire Railway* v. *United States*, 241 U. S. 344, which involved a standard gauge road engaged in the general transportation of passengers and freight between the Coeur d'Alene region in Idaho and Spokane, operated apparently in the same manner as the steam roads conduct their business. That road was called by the Court an "interurban electric."

Finally, in *Village of Hubbard* v. *United States*,

266 U. S. 474, where the question involved was whether certain interurban electric passenger carriers were subject to the rate-making jurisdiction of the Interstate Commerce Commission, it seems quite clear that the Court considered the meaning of the phrase "street, suburban, and interurban electric railways" as embracing the electric roads generally, in contradistinction to the steam railroad class. The discussion is directed to the Commission's jurisdiction over the electrics. The Court said:

> "These cases * * * present * * * the question whether *interurban electric railroads* engaged in interstate commerce are subject generally to regulation by the Interstate Commerce Commission. * * *
>
> "In 1897, the Commission assumed jurisdiction over the passenger fare of *an electric railroad* which operated between the District of Columbia and a neighboring village in Maryland. *Willson* v. *Rock Creek R. Co.*, 7 Inters. Com. Rep. 83. The development of *interurban roads* became general about 1902. The authority to regulate *them* has been consistently exercised by the Commission in many cases and for many purposes. Since 1915, *interurban electric roads* have been required to file with it annual reports of their finances and operations. *Jurisdiction over Urban Electric Lines*, 33 Inters. Com. Rep. 536." (Italics ours.)

In a footnote at this point is the following: "The uniform system of accounts for *electric railways* prescribed by the Commission became effective July 1, 1914." (Italics ours.)

The reference to *Jurisdiction Over Electric Lines* is to a report in a case which, as the Commission in the report said, "involved primarily the propriety of requiring *interstate electric railway companies* to include in their monthly reports of accidents returns covering their entire operations, whether in strictly city service or otherwise. * * * although mention was made of the general question of the Commission's power over *electric railways as a class* distinguished from steam roads." (Italics ours.)

Continuing, the Court said:

> "In exercising authority over their passenger fares, no distinction has been made between those *interurban roads which were engaged in the general transportation of freight* in addition to their passenger and express business and those which were not. On the other hand, the distinction suggested in *Omaha & C. B. Street R. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, 337, 57 L. ed. 1501, 1506, 46 L. R. A. (N. S.) 385, 33 Sup. Ct. Rep. 890, between *interurban railroads* and urban or suburban street railways, has been carefully observed.
>
> "Neither in the Act to Regulate Commerce, * * * nor in any amendments

thereto prior to that of June 18, 1910, * * * is there any specific reference to *electric railroads.* * * * As the act made no distinction between railroads operated by steam and those operated by electricity, the Commission made none. Similarly, the words 'common carrier by railroad,' contained in the Federal Employers' Liability Act, April 22, 1908, * * * and in the Hours of Service Act, March 4, 1907, * * * were applied to *interurban electric railroads.*

"The correctness of the Commission's action in assuming jurisdiction over the interurban roads is confirmed by the action of Congress * * *." (Italics ours.)

Nothing seems clearer than that the Court was discussing the electric railroads, commonly so-called, in contradistinction to the steam railroad class, and that it used the term "interurbans" to embrace all such electrics as were not embraced within the description "street and suburban railways." This would appear from the following from the opinion:

"Transportation Act, February 28, 1920, * * * provided expressly, in five sections, for the exclusion of certain electric railways from the operation of the powers conferred; and it also differentiated interurban electric railways from street and sub-

> urban railways by specific reference to each; * * *."

That the Court understood this term as applied to roads of the character of the Piedmont & Northern is apparent from this fact. In the opinion the Court said:

> "The Commission entertained, in 1908, applications of *interurban electric railroads* to establish for freight through routes and joint rates with steam railroads." (Italics ours.)

In a footnote to this opinion, as supporting the statement just quoted, are cited *Chicago & M. Electric R. Co.* v. *Illinois C. R. Co.*, 13 Inters. Com. Rep. 20; *Cedar Rapids & I. C. R. & Light Co.* v. *Chicago & N. W. R. Co.*, 13 Inters. Com. Rep. 250. Reference to these reports of the Commission, thus cited, will show that these roads, referred to by the Court as "interurban electric railroads" were both standard gauge, freight moving roads, able not only to handle freight in carloads, but in trains. The report further shows that the Chicago & Milwaukee, when the case was heard, had through routes and joint rates, covering freight, in effect with the Wisconsin Central, and that it formerly had like routes and rates in effect with the Illinois Central. The Commission ordered joint freight rates for the Cedar Rapids & Iowa City with the Chicago & Northwestern.

Further, as showing that these roads are of the same general character as the Piedmont & Northern, reference is made to the report of the Commission in *Ex Parte 38*, 122 I. C. C. 414, in which was considered the application of the Commission's rules for inspection of locomotive boilers, and in which the Commission ruled that certain roads, therein named, could "not properly be classed as street, suburban, or interurban electric railways." Among the roads so excluded from the "interurban electric" class were the Chicago, North Shore & Milwaukee Railroad Company and the Cedar Rapids and Iowa City Railway.

THE UNITED STATES RAILWAY LABOR BOARD SO CONSTRUED THE TERM

The United States Railroad Labor Board, construing the term "interurban electric railway" as used in Section 300 of the Transportation Act, 1920—later again referred to in this brief—held the term to include the freight carrying electrics, regardless of the amount of their business, or the manner in which it was carried on. U. S. Labor Board, Decision No. 33, December 11, 1920.

THE INTERSTATE COMMERCE COMMISSION SO USED THE TERM

The Interstate Commerce Commission itself, in its formal reports, had repeatedly used the term "interurban" and "interurban electric" to designate a class of roads of the same type, and con-

ducting the same character of business as the Piedmont & Northern.

In 1911, in *Cincinnati & Columbus Traction Co.* v. *Baltimore & Ohio Southwestern Railroad*, 20 I. C. C. 486, the Commission, dealing with the petition of an electric line for an order establishing for the benefit of said line through routes and through rates for freight traffic with certain connecting steam railroads, referred to the petitioning carrier as belonging to "that class of roads *commonly referred to as interurban roads.*" (Italics ours.)

In 1913, in *St. Louis, Springfield & Peoria Railroad* v. *Peoria & Pekin Union Railway Co.*, 26 I. C. C. 226, 227, 228, the Commission referred to petitioner's properties as "*lines of interurban electric railways*" working under a common management with other electric lines, all known as the Illinois Traction System. Describing the same the Commission said:

> "This system operates 418 miles of railway and extends from St. Louis, Mo., on the south to Peoria, Ill., on the north, and to Danville and Ridge Farm, Ill., on the east. * * * The complainants conduct a general passenger and freight business, and their lines are standard gauge with rails and ballast of regular steam-road standard. Their traffic manager testified that they own 900 cars, of which approximately 125 are passenger and motor cars and 775 are freight cars. The freight cars are of 80,000

pounds capacity each, were constructed in accordance with master car builders' rules, and are equipped with safety appliances required by law and rules of the Commission. It is apparent from the evidence that the complainants' equipment is standard and such as may be interchanged in interstate traffic, and that their roadbed and bridges are built so as to permit the passage over them of standard railroad cars."

The character of business done by these lines, which the Commission termed "interurban," is indicated by the petition before the Commission, which was that the defendant be ordered "to establish through routes and joint through rates between points on the line of road of your petitioners and points on the line of road of the defendant and may be compelled to provide reasonable facilities for operating such through routes and may be ordered to make reasonable rules and regulations with respect to the interchange and return of cars shipped thereon and for the operation of such through routes."

In 1913, in *Louisville Board of Trade* v. *Indianapolis, Columbus & Southern Traction Co.*, 27 I. C. C. 499, 500, in making an order requiring the establishment of through routes and joint rates for freight traffic over the lines of complainant and of defendant lines, the Commission referred to the same generally as "electrically operated railways, or what is *familiarly known as interurban lines.*"

The Commission described the lines involved as follows:

> "From the city of Indianapolis a great network of interurban lines extends in every direction, with an aggregate, as is said, of nearly 2,000 miles of track, reaching practically all the western, northern, and eastern portions of Indiana, as well as southern Michigan and western Ohio. Some twenty of these companies, with lines in the states of Indiana and Ohio, are named as co-defendants herein."

In 1915, in *Chicago, Ottawa & Peoria Railway Co.* v. *Chicago & North Western Ry. Co. et al.*, 33 I. C. C. 573, 575, in dealing with an application for the establishment of through routes and joint rates over the defendant steam lines, the Commission said:

> "Our authority upon a proper showing to require the establishment by steam railroads of through routes and joint rates with *interurban electric railroads* engaged in the interstate transportation of freight has long been settled."

In the *Electric Railway Mail Pay Case*, 58 I. C. C. 455, in which the final decision was rendered only a few months after enactment of the Transportation Act, 1920, the Commission said:

" 'There are *three kinds or classes of electric lines*, each of which is employed to some extent in carriage of the mails. They are known as urban or city lines, suburban lines, *and interurban lines.* Urban lines comprise those operating wholly within city limits.' * * * 'Interurban lines, as the term implies, run between two or more cities. They are operated in some respects like the steam roads, so far as mail transportation is concerned. Many of them do considerable freight and express business in addition to their passenger business.' " (Italics ours.)

THE COMMISSION'S SEVERAL BUREAUS HAVE HERETOFORE CLASSIFIED THE PIEDMONT AND NORTHERN WITH THE INTERURBANS

The Commission's BUREAU OF VALUATION does not classify the Piedmont & Northern with steam railroads, but with other electric lines; and it has as yet made no valuation of the Piedmont & Northern properties (R. 142).

Likewise, the Commission's BUREAU OF STATISTICS AND ACCOUNTS classifies the Piedmont & Northern with other electric interurbans instead of with the steam lines, and takes its annual report upon forms prepared for the electrics (R. 143).

In 1920, shortly after the Transportation Act was enacted, the Commission's BUREAU OF FINANCE, through which the certificate of convenience and necessity provisions of Section 1, and the

provisions relating to issuance of securities, Section 20a, are administered, upon application of the Piedmont & Northern, held that the latter was an interurban electric railway within the meaning of that term as used in Section 20a (R. 143).

THE PHRASE "STREET, SUBURBAN, OR INTERURBAN ELECTRIC RAILWAYS," AS USED IN TRANSPORTATION ACT, 1920, HAS BEEN GENERALLY UNDERSTOOD BY ELECTRIC RAILWAY OFFICIALS, BY STATE COMMISSIONS, AND BY THE INVESTING PUBLIC TO INCLUDE ALL ELECTRICS

As bearing upon the sense in which the words "interurban electric railway" are commonly understood, perhaps nothing can be more informing than the citation of cases which have been presented to various regulatory commissions since Transportation Act, 1920, was enacted. We accordingly cite below cases wherein companies owning and operating electric railroads, many of which are beyond question in the same class as the Piedmont & Northern—and most, if not all of which, may be found within that class, if their status is to be determined as a question of fact by the Interstate Commerce Commission — have procured authority from state commissions to issue securities. None of the issues covered by the cases cited appears to have been authorized by the Interstate Commerce Commission, as reference to the reports and orders of the Commission will disclose. This list of cases is but a small part of those which

might be cited. It is, however, sufficient to show the general understanding of the term "interurban electric railway," since it is not to be believed that the securities covered by the decisions cited have been issued, and distributed to the public under the approval of these state authorities, and without the approval of the Interstate Commerce Commission, unless there has been an understanding upon the part of electric railway officials generally, and of regulatory authorities, and of attorneys advising respecting issues of stocks and bonds, and of the investing public, that the exclusion language in Section 20a covered all electric roads except those operated as a part or parts of a general steam railroad system of transportation.

Application Kansas City, Clay County & St. Joseph Railway Co., Public Service Commission of Missouri, order Nov. 24, 1920, Case No. 2777, $4,150,000. *Application Kansas City Public Service Co.*, order Oct. 16, 1926, $12,465,200, 16 Mo. P. S. C. 355; order Oct. 16, 1926, 267,009 shares no par stock, 16 Mo. P. S. C. 86. *Application Joplin, Pittsburg Railway Co.*, order Aug. 22, 1929, $200,000 common stock, $200,000 bonds, Case No. 6530-6531. *Petition of New York, Westchester & Boston Railway Co.*, Public Service Commission of New York, order May 1, 1925, $1,150,000 bonds, 1 P. S. C. of N. Y., page 49. *Applications Washington, Baltimore & Annapolis Electric Railroad Co.*, Public Service Commission of Maryland, Order No. 6174, Feb. 24, 1921, $240,000 trust certificates and $732,000 bonds, 12 P. S. C. Md. 78;

Order No. 6183, Mar. 4, 1921, $1,400,000 trust notes, 12 P. S. C. Md. 83; Order No. 6200, Mar. 15, 1921, $110,000 bonds, 12 P. S. C. Md. 92; Order No. 6400, July 29, 1921, $234,000 bonds, 12 P. S. C. Md. 239; Order No. 6431, Aug. 25, 1921, $141,000 bonds, 12 P. S. C. Md. 257; Order No. 6481, Oct. 6, 1921, $75,000 bonds, 12 P. S. C. Md. 285; Order No. 6501, Nov. 1, 1921, $66,000 bonds, 12 P. S. C. Md. 297; Order No. 6807, Feb. 21, 1922, $561,000 bonds, 13 P. S. C. Md. 61; Order No. 10470, Aug. 3, 1926, $468,900 Notes, 17 P. S. C. Md. 185. *Application Duluth Street Railway Co.*, Railroad & Warehouse Commission of Minnesota, order Mar. 31, 1924, $500,000 stock, 1923-24 report, page 26. *Application Minneapolis & St. Paul Suburban Railroad Co.*, order Oct. 25, 1928, $500,000 bonds, Minnesota Railroad & Warehouse Commission Report 1927-28, page 194. *Application Minneapolis Street Railway Co. and St. Paul City Railway Co.*, order Dec. 7, 1927—Minneapolis Company $12,037,000 bonds, and St. Paul Company $5,963,000 bonds, Minnesota Railroad & Warehouse Commission Report 1927-28, page 195. *Applications United Electric Railways Co.*, Public Utilities Commission of Rhode Island, order Feb. 16, 1921, $5,000 stock, No. 575, P. U. C. R. I. Rep. 1921, p. 60; order June 22, 1921, $1,000,000 bonds, Order No. 594, P. U. C. R. I. Rep. 1921, pages 76-89; order Oct. 25, 1921, $280,000 stock, P. U. C. R. I. Rep. 1921, pages 122-126; order Dec. 24, 1923, $450,000, P. U. C. R. I. Rep. 1923, p. 61; Order No. 594, $10,599,000 bonds, P. U. C. R. I.

Rep. 1921, pages 76-89, inclusive; Order No. 628, $90,000 bonds, P. U. C. R. I. Rep. 1921, pages 124-126. *Application of San Francisco-Sacramento Railroad Company.* Order No. 10955, Sept. 7, 1922, $200,000 bonds, 22 Railroad Com. Calif. 267. *Application of Sacramento Northern Railroad et al.;* order Oct. 18, 1921, $995,000 stock, 20 Railroad Com. Calif. 679. *Applications of San Francisco-Oakland Terminal Railways;* order June 7, 1920, $124,279.04 notes, 18 Railroad Com. Calif. 291; order June 9, 1922, $600,000 notes, Vol. 21, p. 777. *Applications of Key System Transit Company;* order Dec. 14, 1923, $11,451,010.08 bonds, $16,341,082.80 stock, 24 Railroad Com. Calif. 231; order June 15, 1925, $500,000 bonds, Vol. 26, p. 610; order Feb. 3, 1926, $2,500,000 bonds, Vol. 27, p. 529; order Dec. 13, 1926, $1,500,000 bonds, Vol. 29, p. 33. *Application Kansas City, Kaw Valley & Western Railroad,* Public Service Commission of Kansas, No. 9465, Oct. 1, 1927, 12,000 shares no par stock. *Application Androscoggin & Kennebec Railway Co.,* Public Utilities Commission of Maine, Order No. U-405, Mar. 4, 1920, $845,000 bonds. *Application Aroostook Valley Railroad Co.,* Public Service Commission of Maine; order No. U-628, Nov. 3, 1922, $125,000 bonds. *Applications of Chicago, South Shore & South Bend Railroad,* Nos. 15269, 16422, 17426, Illinois Commerce Commission; authorization order No. 1735, June. 25, 1925, $4,000,000 bonds, 150,000 shares no par stock; authorization order No. 1853, June 30, 1926, $1,060,000 equipment

trust certificates; authorization order No. 1949, June 30, 1927, $710,000 equipment trust certificates. *Applications of Aurora, Elgin & Fox River Electric Co.*, Nos. 12129, 13627, 14605, Illinois Commerce Commission; authorization order No. 1290, Mar. 2, 1922, $5,000 stock; authorization No. 1527, Nov. 28, 1923, $5,000,000 stock; authorization No. 1654, Jan. 14, 1925, $1,800,000 bonds. *Applications of Chicago, Aurora & Elgin Railroad Co.*, Nos. 12432, 12743, 13374, 14656, 16027, 17117, Illinois Commerce Commission; authorization No. 1329, July 13, 1922, $1,050,000 bonds; authorization No. 1363, Oct. 26, 1922, $470,000 equipment trust certificates; authorization No. 1490, July 11, 1923, $300,000 bonds; authorization No. 1650, Dec. 23, 1924, $1,000,000 bonds; authorization No. 1808, Feb. 9, 1926, $19,500,000 stock, $5,000,000 bonds; authorization No. 1920, Mar. 16, 1927, $460,000 trust certificates. *Illinois Traction, Inc.*, Nos. 13113, 13677, 14249, 14611, 15187, 15903, 16864, Illinois Commerce Commission; authorization No. 1464, May 17, 1923, $27,237,100 stock, $7,500,000 bonds; authorization No. 1521, Nov. 21, 1923, $895,000 bonds; authorization No. 1608, July 24, 1924, $737,000 bonds; authorization No. 1643, Dec. 3, 1924, $1,420,000 bonds; authorization No. 1727, June 11, 1925, $726,000 bonds; authorization No. 1796, Dec. 23, 1925, $1,000,000 bonds; authorization No. 1895, Dec. 1, 1926, $878,000 bonds. *Applications Winona Railroad Co.*, Nos. 7616, 7701 and 9181; order June 7, 1924, $600,000 bonds, 10,000 shares

no par stock, Indiana Pub. Service Com. Order Book, Vol. 32, p. 338; order Aug. 15, 1924, $90,000 notes, Vol. 33, p. 356; order Dec. 30, 1927, $260,000 notes, Vol. 46, p. 393. *Application Terre Haute, Indianapolis & Eastern Traction Co.*, No. 7729; order Aug. 28, 1924, $425,000 notes, Indiana Pub. Service Com. Order Book, Vol. 33, p. 420. *Applications Indiana Service Corporation*, Nos. 6836, 6910, 7410, 7695, 7650, 8042, 8156, 8919; order Jan. 12, 1923, $750,000 bonds, Indiana Pub. Service Com. order Book, Vol. 27, p. 143; order Jan. 26, 1923, $400,000 bonds, Vol. 27, p. 212; order Dec. 21, 1923, $672,000 bonds, Vol. 30, p. 415; order Sept. 13, 1924, $460,000 bonds, Vol. 33, p. 494; order Aug. 2, 1924, $661,760 bonds, Vol. 33, p. 234; order May 23, 1925, 21,480 shares common stock, Vol. 36, p. 315; order Aug. 2, 1926, $740,000 preferred stock, Vol. 37, p. 264; order Sept. 8, 1926, 40,000 shares common stock; order Aug. 22, 1925, $2,790,000 preferred stock, Vol. 37, p. 264; order Apr. 16, 1927, 12,100 preferred stock and 50,000 shares common stock, Vol. 44, p. 66. *Application Southern Indiana Gas and Electric Co.*, No. 4309, Public Service Commission of Indiana; order Apr. 1, 1921, $1,420,000 bonds; order Feb. 1, 1924, 750,000 debentures. *Applications Chicago, South Shore & South Bend Railroad*, Nos. 8105, 8558, and 8999, Public Service Commission of Indiana; order June 26, 1925, $4,000,000 bonds, Indiana Pub. Service Com. Order Book, Vol. 36, p. 500; order July 2, 1926, $1,060,000 trust certificates, Vol. 41, p. 38; order July 21, 1927,

$710,000 trust certificates, Vol. 45, p. 164. *Applications Milwaukee Electric Railway and Light Co. and Milwaukee Light, Heat and Traction Co.*, Railroad Commission of Wisconsin; order Oct. 25, 1920, No. S. B. 1563, $1,090,000 notes; order June 16, 1921, No. S. B. 1657, $1,000,000 bonds; order June 21, 1921, S. B. 1677, $3,000,000 stock; order April 28, 1922, S. B. 1772, $3,000,000 stock; order Oct. 3, 1922, S. B. 1822, $12,500,000 bonds; order Oct. 13, 1922, S. B. 1825, $4,160,000 bonds; order Mar. 2, 1923, S. B. 1864, $3,000,000 stock; order May 11, 1923, S. B. 1885, $1,000,000 notes; order Sept. 7, 1923, S. B. 1914, $10,000,000 bonds; order Sept. 7, 1923, S. B. 1916, $5,257,500 bonds; order Dec. 17, 1924, S. B. 2034, $1,000,000 stock; order July 18, 1925, S. B. 2062, $700,000 stock; order Dec. 14, 1925, S. B. 2129, $3,300,000 stock, $2,000,000 notes; order Jan. 19, 1926, S. B. 2140, $3,750,000 stock; order April 13, 1926, S. B. 2170, $2,000,000 bonds; order April 27, 1926, S. B. 2171, $9,800,000 bonds; order June 25, 1926, S. B. 2196, $4,000,000 stock; order Dec. 17, 1926, S. B. 2232, $2,000,000 stock; order April 19, 1927, S. B. 2256, $3,000,000 stock; order May 24, 1927, S. B. 2267, $5,819,000 bonds; order Oct. 11, 1927, S. B. 2289, $1,000,000 stock; order Oct. 14, 1927, S. B. 2291, $2,000,000 stock, $2,500,000 bonds; order Nov. 30, 1927, S. B. 2297, $1,737,000 bonds; order Dec. 24, 1927, S. B. 2304, $2,000,000 stock; order April 4, 1928, S. B. 2323, $2,000,000 stock; order May 23, 1928, S. B. 2340, $6,300,000 stock; order Jan. 15, 1929, S. B. 2377, $10,000,000 bonds. *Applications*

Wisconsin Public Service Corporation, Railroad Commission of Wisconsin; order Oct. 3, 1922, S. B. 1817, $3,200,000 stock, $3,546,000 bonds; order Sept. 22, 1922, S. B. 1821, $1,949,000 bonds; order Jan. 28, 1924, S. B. 1948, $340,000 bonds; order Jan. 28, 1924, S. B. 1947, $350,000 stock, $730,000 bonds; order Aug. 29, 1924, S. B. 2011, $95,000 stock, $207,000 bonds; order Sept. 17, 1924, S. B. 2012, $3,555,000 bonds; order Jan. 24, 1925, S. B. 2045, $327,000 stock; order Feb. 2, 1925; S. B. 2045, $328,000 stock, $983,000 bonds; order Feb. 18, 1925, S. B. 2052, $500,000 stock; order April 14, 1925, S. B. 2068, $500,000 stock; order Dec. 22, 1925, S. B. 2130, $2,750,000 bonds; order Dec. 29, 1925, S. B. 2130, $250,000 bonds; order July 13, 1926, S. B. 2190, $1,850,000 stock; order Sept. 24, 1926, S. B. 2202, $2,500,000 notes; order Feb. 10, 1927, S. B. 2202, $2,500,000 stock; order March 1, 1927, S. B. 2247, $1,750,000 stock; order Aug. 16, 1927, S. B. 2282, $1,000,000 stock; order Nov. 11, 1927, S. B. 2292, $4,000,000 stock, $6,000,000 bonds; order Feb. 23, 1928, S. B. 2314, $2,000,000 stock; order June 14, 1929, S. B. 2400, $1,000,000 stock. *Applications Chicago, North Shore & Milwaukee Railroad Co.,* Railroad Commission of Wisconsin; order June 27, 1923, S. B. 1894, $11,500,000 stock, $2,700,000 notes; order Oct. 25, 1924, S. B. 2024, $1,000,000 stock; order Dec. 12, 1924, S. B. 2033, $7,000,000 bonds; order April 30, 1925, S. B. 2077, $2,500,000 bonds; order April 30, 1925, S. B. 2078, $2,000,000 stock; order April 30, 1925, S. B. 2079, $450,000 bonds;

order Dec. 9, 1925, S. B. 2121, $1,500,000 stock; order Feb. 5, 1926, S. B. 2143, $730,000 notes; order May 3, 1926, S. B. 2176, $1,000,000 stock; order May 3, 1926, S. B. 2177, $1,250,000 bonds; order Sept. 9, 1926, S. B. 2213, $1,500,000 bonds; order Feb. 7, 1927, S. B. 2246, $2,500,000 notes; order Nov. 11, 1927, S. B. 2296, $804,000 equipment trust certificates; order May 22, 1928, S. B. 2334, $2,684,200 stock; order April 26, 1929, S. B. 2391, $2,000,000 notes; order April 26, 1929, S. B. 2392, $2,200,000 bonds; order July 2, 1929, S. B. 2398, $1,000,000 stock.

CONGRESS HAS OFTEN USED THE TERM "INTERURBAN" IN A LIKE MANNER

In various acts of Congress the electric rail carriers have been differentiated from steam railroads, and the term "interurban electric" has been used to describe all such electrics as were not covered by the terms "street electric" or "suburban electric."

The first specific reference to electric railways made by Congress was in the Act of June 18, 1910, 36 Stat. 239, 551, 552, which provided that "the Commission shall not * * * establish any through route classification or rate between street electric passenger railways, not engaged in * * * transporting freight in addition to their passenger and express business, and railroads of a different character." This provision, with immaterial amendments, was re-enacted as Section

15, Paragraph 3 of the Transportation Act of 1920, 41 Stat. 485.

On March 21, 1918, Congress passed the Federal Control Act, providing for the administration of transportation systems taken over by the President, and for the compensation to be paid for their use. The short line railroads had been anxious to be included among the railroads taken over, and had procured the inclusion of a paragraph in Section 1 of the Act declaring that every railroad (with certain exceptions) should be considered as within federal control. Congress did not then see fit to extend the benefits of the provision to all electric railroads. It accordingly made the paragraph subject to the following proviso:

> "Provided, however, That nothing in this paragraph shall be construed as including any *street or interurban electric railway* which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat, and light, or both."

Here Congress desired to grant to carriers of the class to which the Piedmont and Northern belongs, that, is to electric carriers the principal business of which was freight transportation, the benefit of inclusion under federal control, and it desired to exclude electric carriers whose main business was something else than freight transportation. The manner in which it proceeded to

act showed clearly that it considered that the term "interurban electric railways" included electric carriers *the principal business of which was freight transportation.* It accordingly used apt language to distinguish between those carriers and other carriers of the same class.

The Government, through the Railroad Administration, interpreted the term "interurban electric railway," as used in the above-quoted portion of the Federal Control Act, as including carriers electrically operated although the character of the freight service supplied by them was the same in all essential respects as that supplied by steam railroads. It excluded such carriers from the benefits of the legislation in question except only when they could show that the major portion of their operating revenue was from freight business. The fact of this interpretation of this term "interurban electric railway" was directly presented to the committee in evidence at the hearings on the bills which finally became Transportation Act, 1920, as will be pointed out later in this brief.

Congress next dealt with electric railroads in legislation relating to Railway Mail Pay, in the Post Office Department Appropriation Act of July 2, 1918 (40 Stat. L. 748), wherein it provided:

> "That the Interstate Commerce Commission is hereby empowered and directed as soon as practicable to fix and determine from to time the fair and reasonable rates and compensation for the transportation of

mail matter by *urban and interurban electric railway common carriers.*"

Under this Act the Commission instituted an investigation, and *it treated as falling within the provisions of the statute all electric roads, regardless of the extent and character of their freight service.* This investigation was begun July 26, 1918. The issues were submitted in 1919, and a final report was made in August, 1920. *Electric Railway Mail Pay*, 58 I. C. C. 455.

In this last mentioned Act, therefore, the Congress, less than two years before Transportation Act, 1920, was passed, had directed action by the Commission with respect to "interurban electric railways," using those words as descriptive of *all electric railways other than urban electrics*," and the Commission had interpreted the legislation as including all of *that entire class*, irrespective of the amount or character of freight service supplied by them, in the same manner as the United States Railroad Administration, in dealing with like carriers, interpreted like language in the Federal Control Act.

From the foregoing it will be seen that many years before Transportation Act, 1920, was passed the term "interurban" had come to be applied to electric roads to include those not classed as street or suburban roads. That such use was common in 1911 is shown by the fact that the Interstate Commerce Commission then referred to those roads as "*that class of roads commonly referred to as inter-*

urban roads." This constituted express recognition by the Commission at that time of the common public use of the term in that sense.

To summarize what has been said: prior to the enactment of Transportation Act, 1920, the term "interurban electric,—as descriptive of electric lines generally, other than local roads properly classified as street or suburban,—was used (1) commonly by the public; (2) by the United States Railroad Administration, engaged in the operation of both steam and electric carriers under federal control; (3) by the several bureaus of the Interstate Commerce Commission, and by the Commission itself in its formal reports; (4) by the Congress; and (5) by this Court.

This general and uniform use of the term "interurban electric" in a definite and well recognized sense would seem to require that it be taken to have been used in that sense by the Congress when it incorporated the same in paragraph (22) of Section 1, now under consideration.

If, however, the usual meaning of the term is deemed subject to variation upon consideration of other parts of the statute in which said paragraph (22) is found, and of all the circumstances of the enactment of that paragraph, and if we proceed to such consideration, we shall not only find no necessity for such variation, but instead shall find confirmation amounting to demonstration that Congress must have intended to use the term in its commonly accepted sense.

PARAGRAPH (22) WAS INSERTED BY CONGRESS IN RESPONSE TO REQUESTS FOR THE EXCLUSION OF ALL ELECTRICS

The inclusion by Congress of paragraph (22) in Transportation Act, 1920, was in direct response to requests for the exclusion of all electric roads from the scope of the new legislation contained in that Act.

Transportation Act, 1920, was the outgrowth of bills introduced by the respective chairmen of the House Interstate and Foreign Commerce Committee and the Senate Committee on Interstate Commerce. It was the product of the work of those committees. Those members of the committees who were responsible for the form the bill finally took were familiar with the language of the Act to Regulate Commerce, which Transportation Act, 1920, amended to its present form and title. They were familiar with former amendments. They were familiar likewise with other then recent railroad legislation, such as the Federal Control Act. They, of course, intended that, so far as Transportation Act, 1920, amended the Act to Regulate Commerce, such amendments should be harmonious with other portions of that Act, in the sense that words and phrases used in such amendment should be used in the same sense as in other parts of the Act, and in such other recent legislation. It is for this reason that every such amendment, under established rules of construction, will be read in the light of the Act as a whole.

The bill which was introduced by the Chairman

of the Senate Committee was the Cummins Bill, S. 2906, and that introduced by the Chairmany of the House Committee was the Esch Bill, H. R. 4378. The Cummins Bill had been framed on the basis of hearings held by the Senate Committee on Extension of Federal Control. No hearings were held on that bill after it was introduced. In the House extended hearings were held on the Esch Bill, and some of the evidence and statements made in that hearing referred to the Cummins Bill.

Involved in the bills were provisions which brought opposition to the application of them to electric railroads from different groups and for different reasons. Such opposition was made for the express purpose of procuring inclusion of language which should wholly exclude electric lines from the operation of the proposed new legislation.

The electric railroads themselves, and numerous business organizations in southern California, where electric interurban development in the field of freight transportation had been of especial importance, objected to the application of proposed legislation respecting labor disputes.

The state regulatory commissions objected to the application to electric carriers of the provisions respecting securities issues and certificates of convenience and necessity covering new construction and abandonment.

The significant facts are, first, that these three groups, one representative of the electric railroads

themselves, another representative of associations of business men, and another of the state officials charged with the regulation of electric roads, all used the term "interurban electric" in the sense which we have heretofore shown to have been common, as embracing all electric roads other than street and suburban lines, and, second, the further fact that in asking for the elimination of all electric roads from the application of the proposed new legislation they presented language designed to accomplish that purpose which was identical with, or substantially identical with, that adopted by the committee, and incorporated in the sections relating to the matters as to which these groups were concerned.

THE REQUEST OF THE ELECTRIC RAILROADS

The request of the electric railroads was presented by the American Electric Railway Association in the form of a letter, which had been written to Senator Cummins relating to S. 2906. It is printed on page 3418 of Volume III of Hearings Before the House Committee on Interstate Commerce on H. R. 4378, the Esch Bill. It contains the following statements:

> "Sir: We, a committee of the American Electric Railway Association, representing more than 80 per cent of the electric railway mileage in the United States, desire to call your attention to Senate Bill 2906.
> * * *
>
> "The distinction between steam and elec-

tric interurban roads is well known and is constantly recognized by the courts, Congress, and the several State legislatures in dealing with the transportation question. Upward of 60 per cent of all electric railway mileage in the country is strictly city mileage, and not to exceed 5 per cent of the gross earnings of all electric railways, city, suburban, and interurban, is derived from interstate traffic.

"No one will contend that city electric railways are to be classed, for purposes of operation, with steam railroads. The *interurban electric railways* are, to a large extent, affected by their local surroundings; they must depend *largely* upon revenue earned from local communities served, and they are affected to a greater extent by the competition of motor vehicles; they must be considered by themselves. * * *

"To have the wages and working conditions of electric railway employees under the jurisdiction of, and fixed by, a body that passes upon like questions for steam railroad employees can but be disastrous to the electric railway industry. The action of such a body would be certain to be dominated by the ideas of steam railroad employees, and would be likely to result in onerous burdens being placed upon the electric railways, possibly beyond the ability of the communities and companies to bear.

> "To carry out the ideas expressed, *we have prepared, and present herewith proposed amendments to the pending bill, which would exclude all electric railways* from all the provisions of the bill, except only those sections which simply amend the interstate commerce law." (Italics ours.)

The sections of the Cummins Bill referred to as "those which simply amend the interstate commerce law" did not relate to labor, securities, or certificates of convenience and necessity. The new section proposed was designed to prevent the application to electric railroads of any sections dealing with those new matters, and was as follows:

> "None of the provisions of this act, except sections 33 to 38, both inclusive, and sections 40 to 47, both inclusive, shall apply *to so-called 'street, suburban, or interurban electric railways.'* "

THE REQUEST OF THE ASSOCIATION OF BUSINESS ORGANIZATIONS

The request of the association of business organizations is found also in Volume III of the Hearing on H. R. 4378, at page 3552. It is in the form of a letter from the Secretary of the Association, accompanied by a resolution adopted by the Association. The letter is quoted in full and the resolution in part, as follows:

> "Dear Sir: Inclosed herewith you will find

six copies of resolutions passed by the board of directors of the Association of Business Organizations of Los Angeles, at meeting held September 3, 1919. This relates to legislation relative to control of railroads, and specifically requests that because of the entirely different operating and other conditions the electric railways be eliminated from legislation affecting steam railroads. The Association of Business Organizations of Los Angeles is a central organization representing 22 principal commercial organizations named in the attached resolutions of business organizations. Yours truly."

"Resolved by this association, That it request the Congress of the United States *to eliminate altogether* from any legislation relating to the future control and operation of the steam lines *the interurban and street car systems* other provisions than those which may affect them incidentally with reference to interstate freight rates and passenger fares to the extent that they are engaged in interstate commerce." (Italics ours.)

THE REQUEST OF STATE REGULATORY COMMISSIONS

On behalf of the National Association of state regulatory commissions a statement was made by Hon. Charles E. Elmquist, its General Solicitor.

Discussing the section relating to certificates of convenience and necessity, he presented, in the form of a proviso, what finally became paragraph (22), here under consideration. This proviso, as presented, is found on page 1611 of Volume II of the Hearing on H. R. 4378, as follows:

> "Insert at the end of Section 2, line 15, page 11, the following:
>
> " 'Provided, That the authority of the Commission conferred by this section shall not extend to the construction of sidetracks, spur, industry, team or switching tracks, *street car and electric interurban lines*, or to extensions of lines of steam railroads or to the construction of new lines to be located wholly within one state.' "

Discussing this proposed amendment, at page 1613, Mr. Elmquist said:

> "The same amendment refers to electric interurban lines. There are a great many electric interurban lines, the *average* length of which in this country is about 48 miles. *Generally speaking*, they perform a local service under the laws of the State. They are subject to the regulatory powers of the local commissions. We can see no good reason for transferring to the Interstate Commerce Commission the power to determine

> the extension or the abandonment of those lines which are specially designed to take care of local service." (Italics ours.)

Discussing the section giving the federal commission control over securities issues, Mr. Elmquist asked for the inclusion of another proviso, which appears on page 1629, as follows:

> "Provided, That the provisions of this section shall not apply to *street car companies or electric interurban companies.*"

In support of this request Mr. Elmquist said:

> "The conference gave a great deal of consideration to the question of security control. We recognized the force of the argument that has been repeatedly made before Congress, that there is a real evil in requiring a railroad which operates through several States to go to several different commissions with security applications. * * *
>
> "We believe, therefore, that this Congress should place the general control of security issues in one Federal body, whereby these larger companies can at one time secure an issue under proper legal safeguards. We do not believe that the same evil exists in connection with *interurban lines or street car lines.*"

It will thus be seen that the electric railroads themselves, business men's organizations, and the state regulatory authorities asked that electric lines be excluded from the operation of provisions of law granting new powers to the Interstate Commerce Commission. Nobody asked that they be subjected to the new legislation. It will be seen also that these several groups used the term "interurban electric railway" as descriptive of a class embracing all the electrics except local lines classed as "street" or "street and suburban."

Later in this brief we will show that the Congress incorporated in various sections of the Transportation Act, 1920, substantially the exact language which was thus presented to it, avowedly designed to exclude all electric lines from the operation of the new legislation proposed, but that it incorporated the same with certain limiting phrases added, the effect of which was to withhold from the exclusion requested any electric line "operated as a part or parts of a general steam railroad system," and so as to withhold from the exclusion of Section 15a all freight-carrying electrics. The occasion for the limitation relating to the provisions of Section 15a will be now adverted to. It is of the utmost significance and compels the conclusion that Congress was well aware when it used the term "interurban electric" that it included freight-carrying electrics which interchanged traffic with steam lines, and conducted their business in substantially the same manner as the steam roads.

CONGRESS USED THE TERM "INTERURBAN ELECTRIC" WITH OBVIOUS INTENT THAT IT SHOULD INCLUDE ROADS OF THE TYPE OF THE PIEDMONT AND NORTHERN

Representatives of a few electric railroads appeared before the House Committee and complained of their exclusion from federal control by the provisions of the Federal Control Act, already quoted, which excluded "interurban electric railways," the principal source of the revenue of which was not freight transportation. Representatives of these lines asserted that they did the same character of freight business as steam railroads and that if they were enabled to enjoy the same rates as the roads under federal control they would derive the major part of their revenue from freight transportation, but that they were, by the Railroad Administration, refused the benefit of federal control because of the provision of the Federal Control Act, that it should not apply to any "interurban electric railway" if its principal source of operating revenue was other than freight transportation.

These carriers asked the committee to take care of them by such language in the rate-making provision of the new legislation, as would enable them to receive the same treatment as to rates as the steam railroads.

By these complaints and requests the Congress had thrust upon its attention the interpretation which the Government, through the Railroad Administration, had placed upon the phrase "inter-

urban electric railway." Congress knew that it was interpreted as including freight carrying electric roads, which carried on their freight business in the same manner as steam railroads. To show how clearly this was brought to the committee's attention, we quote from the statement of Mr. Ben B. Cain, at page 1880, Volume II of the Hearing on H. R. 4378:

> "They have electric locomotives and car equipment just like the other lines and physical connections, so that they handle the transportation of the steam lines just as the steam road does. They have their turnouts and their depots and everything else built for that purpose, and the exclusion of those roads is to penalize the highest character of construction. Of course they have been excluded from the operation of the short-line contract because of a proviso in section 1 of the act of March 21, 1918, which excluded all electric interurban railroads the principal source of whose tonnage might be passenger business. * * * That is the language of the act, and they are excluded on account of the literal application of the terms of the act, I think, rather than the spirit of the act, but that has been the ruling of the Railroad Administration."

We also quote from the testimony of Mr. J. D. Cornell, at page 1947, Volume II of the Hearing on H. R. 4378:

"I represent the Joplin & Pittsburgh Railway and the Kansas City, Kaw Valley & Western Railway, both of which are electrically operated railroads.

"My particular purpose here is to impress upon your committee the vital importance of the construction of the words 'interurban railway.' I will bear first upon the properties that we have at the present time operating between Kansas City, Mo., and Lawrence, Kans.; the Kansas City, Kaw Valley & Western Railway, a distance of 42 miles, under construction at the time of the war, suspended on account of the war, with a charter as a regular railroad to operate between Kansas City and Topeka, a distance of about 67 miles, and the ultimate idea of extending on to Manhattan, Kans.

"This line was chartered as a regular railroad under the railroad act of the State of Kansas; was constructed for heavy traffic, with a maximum grade of less than 2 per cent; has sidings to accommodate from 30 to 50 freight cars; interchanges carload freight with all connections at Kansas City, and through Bonner Springs and Lawrence, Kans., with the trunk lines; has working arrangements, through rates, and through billing arrangements with all lines through Kansas City, and it files tariffs and regular reports to the Interstate Commerce Commission. * * *

"The Chairman. Your idea is that you do not believe it should be a classification based on the motive power?

"Mr. Cornell: No; and covered by the word 'interurban'. * * *"

This construction of the term "interurban electric" by the Railroad Administration, which applied it to roads of the same type as the Piedmont and Northern, was accordingly well known to Congress, being thus forcibly thrust upon its attention at the very moment it was framing Transportation Act, 1920. Nevertheless Congress used the same term again. It must therefore have approved and adopted the construction, as expressing the sense in which the term was used by it. This conclusion is obvious, and is in accord with firmly established rules of construction. But there is much convincing confirmatory evidence in the manner in which Congress used the term "interurban electric" in the various provisions of Transportation Act, 1920.

First, as to new construction, we have seen that the electric railroads and the state regulatory authorities and various organizations of business men asked that all electric lines be eliminated from the scope of such new legislation as should be contained in the bill. Nobody asked that they be included. The Congress in Section 1 used the exclusion language which had been recommended by the electric railroads themselves,—but with a qualification. Exclusion by paragraph (22) was

extended to "street, suburban, or interurban electric railways, *which are not operated as a part or parts of a general steam railroad system of transportation.*"

Does not the very limitation so added,—"which are not operated as a part or parts of a general steam railroad system of transportation"—indicate a clear perception by Congress of the all-inclusive character of the description "street, suburban, or interurban electric railways"? Is it not apparent that, while disposed to comply with the request made that the electrics generally be excluded, and while using for that purpose the excluding language presented by the electric lines, Congress nevertheless designed to modify, and did so modify, such recommended language as to prevent any steam railroad system from using an electrically operated road as a means of escaping from the jurisdiction of the Commission designed to be imposed by the Act? And does not the fact that it deemed such modifying language necessary show that it understood the language as presented to it to embrace all the electric lines, as was expressly designed, and stated to the Congress by those who framed it?

Second, as to regulation of securities issues. The same groups which had asked exclusion of all electrics from the provisions relating to construction and abandonment asked their exclusion also from the provisions which became Section 20a. And the Congress granted exclusion to the same extent and by the same language as was used in Section 1.

Third, as to labor disputes. The electric railroads asked that they be not brought under the labor provisions, and the Congress, in Section 300, granted exclusion to the same extent, and by substantially the identical language used in Section 1, such language being as follows: "except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

Fourth, as to the rate-making provisions, which became Section 15a. Certain freight carrying electrics had earnestly contended that they were entitled to receive the same rate-making treatment as Congress granted to the steam roads, as we have shown by evidence offered before the committee. They asked that the rate making provisions of the bill should be made applicable to them. And Congress granted what they wanted. The exclusion language of Section 15a was varied so as to exclude only street and suburban electric railroads not operated as a part of a general steam railroad system, and interurban electrics not engaged in the general transportation of freight. The exclusion language was as follows:

> "excluding * * * (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation *or engaged in the general transportation of freight.*"

Fifth, in Section 204 of Transportation Act, 1920, providing for the reimbursement of deficits during federal control out of the Federal Treasury, the Congress used still different exclusion language, as follows:

> "The term 'carrier' * * * does not include any street or interurban electric railway which has as its principal source of operating revenue, urban, suburban, or interurban passenger traffic or sale of power, heat and light, or both."

Section 209, providing a guaranty to carriers after termination of federal control, contained exclusion language closely similar to that of the related Section 204, as follows:

> "The term 'carrier' * * * does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both."

The discriminating care with which, as has been shown, Congress adapted the language of these various sections of the Act to accomplish complete exclusion where complete exclusion was desired, and to include freight carrying electrics where in-

clusion of such freight carriers was desired, and to include such electrics when their principal business was freight transportation, where that only was desired, compels the conclusion that Congress understood the term "interurban electric railway" as descriptive of a class, and intended it to include all of that class regardless of the amount and character of freight traffic transported by any.

If the term "interurban electric railway," as used in various parts of Transportation Act, 1920, is given the meaning in which it was commonly used by the United States Railroad Labor Board, the bureaus of the Interstate Commerce Commission, and the Commission itself, by this Court and by the public, the question as to what roads the respective portions of the Act apply to will be easy of determination, but if the question whether a road is or not an interurban depends upon the quantity and interchange character of the traffic it transports, and the manner in which its business is conducted, nobody can know whether any particular portion of the Act applies to a particular road except after a hearing and final decision covering that road by the Commission, or by the Court, if the Commission's decision be contested.

This is obviously true of the provisions relating to construction and abandonment, securities issues, and labor disputes; and it is true also of Section 15a. All of the roads which engage in the general transportation of freight are subject to the provisions of Section 15a, but not all electrics engaged exclusively in the transportation of pas-

sengers are necessarily excluded if decision as to interurban status depends upon business done. If they interchange passengers with connecting steam roads, and do important business, they may be held by the Commission something more than interurbans, and hence not within the exclusion language of Section 15a. Only a trial of the issue can determine in each case.

Likewise, if business was the deciding factor as to interurban status, the guaranty section was uncertain of application. The exclusion, in that section of interurbans the major part of the income of which was derived from something else than freight transportation, instead of being clear and definite, as the Railroad Administration interpreted it, was quite unclear. An electric carrier, which did an important passenger business, interchanging passengers with other lines, might be held something more than a "street, suburban or interurban railway," and hence not within the exclusion language.

Can Congress have designed to leave this question of guaranty in any such uncertainty?

Can it have intended that passenger carrying roads might come under Section 15a and under the guaranty section?

Can it have intended that some of the electrics should be under the Labor Board and some should not be?

Can Congress have intended that companies desiring to build extensions or to issue securities should be left uncertain as to whether they must

proceed under federal or state laws, with no manner of determining except by instituting proceedings before the Commission, and trying the issue? Can Congress have intended that state authorities should be left wholly unable to determine whether any particular carrier remained or not subject to state jurisdiction as to such construction or securities issues?

THE COMMISSION AND THE COURT BELOW HAVE ERRONEOUSLY DISREGARDED THE OBVIOUS INTENT OF CONGRESS

The Interstate Commerce Commission has undertaken no definition of the term "interurban electric railway" which will enable determination to be made whether a given road falls within that class otherwise than by a trial of a proceeding before it. Both the Commission and the court below, hold that the interurban or non-interurban character of a road depends upon the extent and distribution of its interstate business, and the interchange relations maintained by it with other carriers. They are plainly of the opinion that a carrier may be an interurban at one time and by development of its business may lose that character. If this be so, logically a falling off in its business or some change in its methods of operation may cause it again to change its character, and cause its return again back into the excepted class.

In this way, a given road may, with the mere variation of its business, pass back and forth between state and federal jurisdiction. Whatever

it may think its status, and however scrupulously according to law it may seek to proceed, it will never be possible to be entirely certain that its construction is not unlawful, and its security issues void. And state authorities will never know when it is their duty to insist upon compliance with state law, and when they are without power to insist.

It would be unbelievable that the Commission and the court below contemplated any such shifting jurisdiction, had that fact not been made clear beyond misunderstanding by language which will be quoted below.

It, of course follows, from the Commission's decision that whether a given road is or not an interurban must depend upon the uncertain event of the Commission's judgment upon the facts respecting the business of that road. It is necessary, however, to go to the Commission's brief filed in the court below to discover language clearly recognizing that the "interurban" character of a road is something which may appear and disappear with the mere increase or decrease of the volume of its business, and with the increase or decrease of the area from which it draws or to which it sends traffic, and with changes in its methods of operation and its business relationships with other roads.

The Commission recognizes, as it must, that the provisions of Section 15a which subject interurbans to the provisions of that section, if engaged in the general transportation of freight, must be taken to show that electric lines may be freight-

carrying lines, and yet be interurbans, and hence not subject to the jurisdiction of the Commission as to new construction.

Strangely enough, however, the Commission refuses to take note of the fact that in Section 204 of the Act, the so-called guaranty section, the Congress excluded from the benefit of the guaranty interurban electric railways the principal source of revenue of which was not freight traffic. This exclusion would seem to make it obvious that the "interurban electric railways," covered by that section, were all of them freight carrying electrics the principal business of which was transportation of freight.

To be successful, such freight carrying electrics must of course, have standard tracks and equipment, and must interchange business with connecting lines under through rates. Indeed, under the law it is the duty of every carrier subject to the Act to establish through rates and through routes whenever needed. Efficient methods of operation, well-established relationships with connecting roads, free interchange of traffic, and the movement of traffic originating in, or destined to, points throughout a widespread area are but the indicia of any successful railroad, the principal business of which is freight transportation. And we have seen from the provisions of Section 204 of Transportation Act, 1920, that such roads may be interurban.

Disregarding this, the Commission based its decision denying the status of an interurban to the

Piedmont & Northern upon the fact that it had these characteristics. In its brief in the court below the Commission in effect contended that an interurban ceases to be an interurban when it builds up a substantial interstate business, or, in other words, by reason merely of its success, as will appear from the following quotation from that brief:

> "Unquestionably some weight must be given to the difference in language of the excepting clause of section 15a and that of section 1 (22), herein under construction, namely, to the fact that, while under the express language of the former electric interurbans are not excluded if they are engaged in general transportation of freight, this is not true of the language of the latter. But it does not follow that the force to be given the difference in language should be of unlimited scope. The reason for the difference in language seems very clear. While an electric interurban, which has, in connection with its local business, *built up a considerable interstate freight business*, should, for the sake of uniformity in rates, be included in the general rate adjustments provided for in section 15a, still if its principal and primary business *continued to be* the purely local carriage of passengers and small freight, the extension of its lines and facilities for such purposes likewise re-

> mained matters chiefly of local concern and should be left to local authority. But where, as here, the physical railroad, as linked up by the proposed extensions, will cross state lines and where, as here, the usual electric interurban passenger business is of minor importance, the exclusively local passenger and freight business is a small proportion of the whole and the avowed purpose of the extension of lines *is to assure petitioner of a strong position as a participant in through traffic* with large trunk line railroads (Petition, p. 13), the local interest in the new extensions certainly does not measure up to the federal interest in what would obviously be a new link in the chain of the country's interstate railroads.
>
> "To attribute greater weight than the above to said difference in language seems impossible." (Italics ours.)

This contention was accepted by the court below, and carried into its opinion, almost in the language in which made, as appears from the following portion of the opinion:

> "The difference in language between the exception in Section 15a and the exception in Section 1, Paragraph 22, may not be ignored, but it is accounted for by the fact, that in one case Congress was dealing with rates, and in the other, with the construc-

tion of new lines. It evidently concluded that if an electric interurban road should *build up a business of transporting property to such an extent as to be engaged in the general transportation of freight*, it should be included in the general rate adjustment provided in Section 15a with a view to uniformity of rates and the connection of the carrier with steam railroads. On the other hand, Congress was of the opinion that so long as an electric carrier should remain independent of steam railroads in its operation and control, and should be engaged *in the local carriage of passengers and freight, as its primary business*, the extension of its line would remain a matter of local concern and should be left to the regulation of local authority. It is obviously difficult to form an exact definition of the term under discussion and to say *when the general freight business of an electric railway has become so great that it had crossed the line between an interurban railroad, engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute.*" (R. 246.) (Italics ours.)

If the term "interurban electric railway" as the same appears in the several parts of Transportation Act, 1920, is treated as used in the sense which we have shown it was commonly used, it will always be clear whether a given road falls within

the provisions of a certain portion of the Act or does not, and whether, with respect to construction or securities issues, it is or not subject to regulation by state authorities. If, on the other hand, the construction given to the term by the Commission and by the court below is adopted, it can never be known except as the result of litigation, and even when the status of a carrier has been settled by litigation, it may afterwards at any time change.

THE COMMISSION'S CONSTRUCTION OF THE TERM "INTERURBAN" IN THIS CASE IS INCONSISTENT WITH ITS CONSTRUCTION OF THE SAME TERM IN OTHER CASES

The court below in its opinion points out that the Commission has been inconsistent in its construction of the term "interurban."

We have seen that in 1920, directly after the Act was passed, the Commission declined to exercise control over the Piedmont and Northern as to securities issues, holding that it was excepted from the application of Section 20a as an "interurban electric."

In *Application of Section 15a to Lackawanna & Wyoming Valley Railroad*, 105 I. C. C. 178, 183, the majority of the Commission, ruling that the Commission must be governed by the language used by Congress in Section 15a, and must apply that section to *all* freight carrying electrics, said:

> *"Had Congress intended that Section 15a should be applied to only such electric lines*

as are substantially similar in their operation and traffic to steam railroads generally, it could easily have made that intention plain by appropriate language."

Quite obviously the converse is true, and if Congress had intended that electric interurbans which are substantially similar in their operation and traffic to steam railroads generally *should not be excluded under paragraph (22), Section 1, it could easily have made that intention plain by appropriate language.*

In *Application of Michigan United Railways Company*, 67 I. C. C. 452, the Commission said:

> "It appears that the line of railroad in question serves the cities of Lansing, Jackson, Battle Creek, and Kalamazoo, and adjacent territory, handling freight as well as passengers, and is electrically operated. * * * The line has physical connection with the tracks of the Pere Marquette Railway at North Lansing where interchange of freight cars is made, but is not included in the operating system of any steam carrier. * * *
>
> "*We are of the opinion that paragraph (18) of Section 1 of the act does not apply to the situation here presented, and that we are without jurisdiction to issue a certificate authorizing operation as prayed for in the application.*" (Italics ours.)

On the other hand, in *Sacramento Northern Application*, 71 I. C. C. 653, 79 I. C. C. 782, and in *Ex Parte 38*, 122 I. C. C. 414, the Commission reversed itself and denied the status of interurbans to roads similar to the Piedmont and Northern.

THE OPINIONS OF THIS COURT HAVE BEEN MISAPPLIED BELOW

The court below appears to have sustained the Commission in its classification of the Piedmont and Northern upon the supposed authority of the decision of this Court in *Texas & Pacific* v. *Gulf, Colorado & Santa Fe*, 270 U. S. 266. In that case the Santa Fe had constructed a track approximately 8 miles long wholly within the State of Texas for the purpose of reaching certain industries located upon the line of the Texas & Pacific. It claimed exemption from the provisions relating to certificates of convenience and necessity, in the Transportation Act, upon the ground that the new track constructed was an industrial track, excepted from the Commissioner's jurisdiction by the provisions of paragraph (22).

In its opinion holding that the new track was not within the exemption in paragraph (22) this Court said:

> "In support of its contention that the proposed line constitutes an industrial track, the Santa Fe cites instructions differentiating branches from spurs, which are given by the Interstate Commerce Commission in

> forms long prescribed for accounting purposes. It points also to uses made of these terms in other connections by courts, by the Commission, and by state legislatures. A truer guide to the meaning of the terms extension and industrial track, as used in par. 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern.
>
> "When the clauses in pars. 18 to 22 are read in the light of this Congressional policy, the meaning and scope of the terms extension and industrial track become clear."

The court below in this case quoted this language and appears to have considered the same as establishing that if the Piedmont & Northern is doing business of such importance that an extension of its lines would have upon its competitors practically the same effect as the like extension under the like circumstances of a steam railroad, then the Piedmont & Northern can not be held an interurban.

We submit that there is a wide difference be-

tween the two cases. In *Texas & Pacific* v. *Gulf, Colorado & Santa Fe*, what the Santa Fe sought to do was to enter new territory. Its additional track was not for the more convenient service of territory already served by the Santa Fe. It was to secure the business of territory served by the Texas & Pacific. To accomplish this purpose the Santa Fe sought to avoid subjecting its proposed invasion of Texas & Pacific territory to the approval of the Commission by giving it the appearance of an industrial track. Although the new line was approximately 8 miles long, it placed no station thereon, did no passenger business thereover, and otherwise operated the same in all respects like an industrial track.

It was an attempt by subterfuge to defeat the law. Courts have regard to the substance and not the form. They pierce through a superficial appearance given any transaction to discover its true character. The effect of the Court's decision in that case was that the Santa Fe could not defeat the purpose of the law by calling an eight-mile extension into the territory of another road an industrial track, and by so constructing and operating it as to give it the superficial appearance of an industrial track.

In the Santa Fe case the court necessarily considered the use the road was to be put to, since that determined whether it fell within the exception of the statute. In the case of steam roads *all* construction is subject to the Commission's jurisdiction unless it has a certain character—and whether

it has that character must be determined by the use it is put to. On the other hand, street, suburban and interurban electric railways are exempt in their entirety, without regard to the character of their use. As to them the decisive question is, "Does the applicant *fall within the class named?*" If it does, it is exempt, regardless of the amount of business, either passenger or freight, which it may do, and of its effect upon other lines. As to steam railroads, on the other hand, the decisive question is, "What is the *character of the use* the new track is to be put to?" Hence the business to be done determines whether it is or not exempt, while it can never so determine in the case of a road falling within an excepted class.

The Commission in its brief below also cited *Spokane & Inland Empire Railroad* v. *United States*, 241 U. S. 344, and the court below evidently placed much reliance upon that case, making reference to the same as "particularly pertinent" (R.247). Its particular pertinency, however, is not easy to discover. It was a prosecution for failure to equip passenger cars with safety appliances which were required by law of carriers subject to the Interstate Commerce Act, with the exception that the requirement should not apply to "trains, cars, and locomotives which are used upon street railways." The carrier in that case operated a street railway system in Spokane and several "interurban electric lines," one of which ran from Spokane to Coeur d'Alene, on which the cars in

question were operated. "The street car business was entirely separate from that done by the interurban line, the employees of the one having nothing whatever to do with the other, and although stops were made by interurban trains within the city limits, and while on the street railway tracks, they were made solely for the purpose of taking on and letting off passengers to and from stations outside the city." The cars in question were operated in interurban trains between Spokane and Coeur d'Alene.

The defense was that because they thus operated over street railway tracks in Spokane they were "used upon street railways," and hence were within the exception. Of course, it is obvious that such a construction would have opened the way, as the Court pointed out, to the easy defeat of the purpose of the statute "since the inevitable result of sustaining the contention would be to put it in the power of a railroad, by operating a train for a trifling distance over tracks within the exception, to thereby secure the right thereafter to operate such train over long distances without regard to compliance with the safeguards of the statute, which otherwise would be controlling." As the Court said: "The want of merit in the contentions is clear."

The case is not analogous. If the prosecution had been for failure to equip the street cars of the respondent road operating exclusively upon the streets of Spokane, upon the ground that the obvious purpose of Congress in enacting the law and

its amendments was to secure the safety of railroad employees, and that this purpose, in the case of the respondent road, would not be fully accomplished without extending the law to the street railway operations, that would have been an analogous case. It would have been an attempt to apply the law where Congress had said it should not apply, as is attempted in this case.

THERE IS NO EVIDENCE TO SUSTAIN THE COMMISSION'S FINDING THAT THE PIEDMONT AND NORTHERN IS NOT AN INTERURBAN

The evidence in this case conclusively shows that the Piedmont & Northern falls within the "interurban electric" class. The Commission itself found that it "performs an ordinary interurban passenger service." (R. 37.) The court below found that it uses the city streets largely for pick-up and delivery freight service, and that this is "*a peculiar characteristic of the Piedmont & Northern and other interurban roads*" (R. 233); that it "is even possible for electric locomotives to go inside a building, where a steam locomotive can not go"; that there "are more daily freight trains in small units"; and "more frequent stops * * * in local station-to-station movement of freight" on the Piedmont & Northern than on a typical steam road; and that there are local switches for industrial plants, "so that freight is delivered and picked up all over the line"; and that "local freight service * * * is also more flexible and convenient than that rendered by the steam railways."

(R. 234.) The chief difference "between the local freight service of the Piedmont & Northern and that of the steam railroads" consists in such use of the street railway systems to gather up and deliver freight in the cities and in the greater number of local freight stations between cities and the operation of its freight trains in smaller units with greater frequency and in the speedier delivery of local freight between nearby points (R. 234-235).

These are characteristics which mark the Piedmont & Northern as not in the steam railroad class. They are characteristics which none of the steam railroads have, but which the interurbans do have. To use language which the court below used in speaking of them, just above quoted, they are "peculiar characteristics of the Piedmont & Northern and other interurban roads." They mark the Piedmont & Northern as in the interurban class.

To take the Piedmont & Northern out of this class there is no testimony whatever. The characteristics relied upon to do that, by the Commission and by the court below, have none of them any relevancy for that purpose, because they are characteristics common both to interurban and steam railroads. These will be considered.

First. That the roadbed, rolling stock and equipment are well suited to cooperate with steam railroads in the transmission of freight to distant points.

Interurbans are subject to the Interstate Commerce Act. By paragraph (4) of Section 1 it is

made the duty of every such carrier to provide transportation (defined in paragraph (3) to include locomotives and cars and all instrumentalities and facilities of shipment) upon reasonable request therefor, and to establish through routes and just and reasonable charges applicable thereto. By paragraph (10) of said section every such carrier is required to furnish reasonable car service, including the supply, movement, and interchange of locomotives and cars used in transportation.

It seems unnecessary to argue that mere performance of its duty under the law can not change the character or status of an interurban line.

Second. That its business methods are similar in many respects to those of steam railroads, in the publication of tariffs and otherwise, and that it belongs to traffic organizations of steam roads, and that it receives and forwards freight from and to origin and destination points scattered over a broad area covering many states.

A freight carrying electric, to do a successful freight business, must adopt these methods. The adoption of them, and the movement of freight traffic received from or destined to distant points on other lines merely shows that the carrier is operating efficiently and successfully.

Third. That 92 per cent of the revenue of the Piedmont and Northern is derived from freight traffic, and only 8 per cent from passenger traffic. This is wholly insignificant unless it be first established that an interurban may not have freight

traffic as its principal source of revenue. The contrary is clear from the fact that Congress in the Federal Control Act (41 Stat. 453) and in Section 204 of the Transportation Act (41 Stat. 460) excluded interurban electrics in general, but so far only as the transportation of freight was not *their principal source of operating revenue.* This makes it clear beyond opportunity for reasonable question that some interurban electrics do derive their principal operating revenue from freight transportation.

Fourth. That only 4.75 per cent of the freight revenue of the Piedmont and Northern comes from the movement of freight not interchanged, and the remaining 95.25 per cent from freight interchanged with steam lines, and that the major part of its carload traffic is so interchanged.

These facts are also without relevancy to prove the Piedmont and Northern not an interurban. An interurban, as we have just pointed out, may be a road the principal business of which is transportation of freight. The purpose of the building of the Piedmont and Northern, "from the beginning, was to construct a line of railroad which would aid in the industrial development of the Piedmont Region and serve as a means by which mills and factories could find connections with the steam railroads of the country for the delivery of freight." (R. 235.) It was designed as a freight carrying road. It was to supply the flexible service peculiar to an interurban, of picking up and delivering freight at the factory door. It was to promote an intense in-

dustrial development. Its freight naturally would be carload freight moving principally from or to origin or destination points on steam lines located in all parts of the United States.

The more successful this road should be in its purpose to build up the industrial development of the Piedmont Region the larger the volume of its interchange freight traffic would be, and the less would be the percentage of its revenue derived from local freight. Hence it is that the important freight business which it does, and the large proportion of that business which is interchanged with steam roads, proves merely the successful character of the enterprise. It has no significance as indicating that the Piedmont and Northern is not an interurban.

The court below, however, clearly considered this general freight business, interchanged with other roads, as taking the Piedmont and Northern out of the interurban class. In its opinion, having described the local passenger and freight business, undoubtedly interurban in character, the court said:

> "The local passenger and local freight business thus described give to the road the peculiar features upon which the petitioner relies to distinguish it from the ordinary steam railroad. *But this business constitutes only a small part of the petitioner's operations. Far greater is its general freight business, made possible by interchange relations with steam trunk lines* in

the south through which it is connected for the receipt and delivery of property with vast sections of the United States. *Upon this phase of its activities, the Commission, in its opinion, and the opponents of the petitioner in this case depend to show that the road is not merely an interurban electric railway, but something far more important in the business of transportation.* In the nature of things, its extra-interurban operations consist of freight movements. This is so because the great bulk of its passenger traffic is local and is carried in cars which cannot be used on steam roads; while its freight cars can be and are freely interchanged with connecting steam railroads." (R. 235.)

* * *

"*It is obviously difficult* to form an exact definition of the term under discussion and *to say when the general freight business of an electric railway has become so great that it has crossed the line between an interurban railroad,* engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute. *But there is no difficulty in the case at bar* in determining that the Piedmont and Northern has *ceased to be primarily an interurban railroad.* If any line of demarcation is to be drawn there can be no doubt that *a railroad, 92 per cent of whose traffic comes from the general transportation of freight,*

> *and 95 per cent of whose freight traffic is interchanged with carriers* connecting it with all parts of the United States, *is to be placed in the same category as a general steam railroad.*" (R. 246.) (Italics ours.)

There is no escape from recognition of what has been done in this case. The Commission has held the Piedmont & Northern not an "electric interurban railway" solely because it is doing a successful and large freight business interchanged with connecting lines. While Congress excepted *all* interurban electric railways, the Commission has determined to except something less than all. It has determined that it will stretch the language of the statute to cover some roads which Congress did not cover, but which, in the opinion of the Commission, ought to be covered.

It may be that extensions of electric railroads ought to be subject to regulation. It was, as we have seen, represented to the Congress by the Electrics that "not to exceed 5 per cent of the gross earnings of all electric railways * * * is derived from interstate traffic." Congress evidently felt that the interurbans did not sufficiently affect the interstate transportation situation to call for a regulation of their new construction and of their securities issues. It may possibly have been in error; but it is not for a commission or a court, under the guise of construction, to do what Congress left undone, even though it may think Congress made a mistake.

THE COMMISSION AND THE COURT BELOW CALLED THE PIEDMONT AND NORTHERN AN INTERURBAN, BUT REFUSED IT THE BENEFIT OF THAT CLASSIFICATION

So clearly does the Piedmont & Northern fall within the interurban class that both the Commission and the court below called it an interurban, and found that it performs the services of an interurban, while refusing it the benefit of that classification.

In its report (R. 37) the Commission, speaking of the passenger service of the Piedmont & Northern, says: "The line * * * performs an ordinary interurban passenger service."

The Commission's argument in its brief below, in this case, may fairly be said to be that the Piedmont & Northern is an interurban which ought to be regulated. That it falls within the description of an interurban in all respects—aside from its capacity to do an important freight business, and the fact that it does such business—is not denied. It is urged merely that its business has become so important that the federal exceeds the local interest. It is said:

> "*While an electric interurban* which has, in connection with its local business, built up a considerable interstate freight business, should * * * be included (under) 15a, *still if its principal and primary business continued to be the purely local carriage of passengers and small freight*, the

> extension of its lines * * * should be left to local authority, but when, *as here*, * * * the exclusively local passenger and freight business *is a small proportion of the whole * * * the local interest* in the new extension certainly *does not measure up to the federal interest.*" (Italics ours.)

Here is no denial of the interurban character of the passenger business and of the strictly local freight business. It is stressed only that such business is of small importance *in comparison with the larger interstate business.*

This begs the question under consideration. The assumption is gratuitously indulged that interstate business, and business not "strictly local" is incompatible with interurban character on the part of the carrier, whereas, as we have seen, Congress used the term "interurban electric railway" to cover electrics the principal source of revenue of which was freight traffic.

In the opinion below, while the Court sustained what the Commission did, *it nevertheless called the Piedmont & Northern an interurban.* It said:

> "The use of city streets for the collection and delivery of freight is a peculiar characteristic of the *Piedmont & Northern and other interurban roads.* (R. 233.)
>
> "It is true that *an interurban carrier* may be entitled to that descriptive name

although it participate in general freight traffic. * * * Freight traffic may be *limited in extent* and within the scope of a carrier devoted primarily to local business, and at the same time be general in its nature. * * * It is obviously difficult to frame an exact definition, and to say when the general freight business of an electric railway has *become so great that it has crossed the line between an interurban railroad* engaging in the general transportation of freight and a general carrier subject to the provisions of the statute. But there is no difficulty in the case at bar in determining that the Piedmont & Northern has ceased to be *primarily* an interurban railroad. * * * It is going too far to say that the Piedmont & Northern is outside the jurisdiction of the Commission over extensions because *literally speaking it is an interurban.* (Italics ours.) (R. 246-247.)

Respectfully submitted,

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